

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT  
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: CONTROVERSY  
ADVANCED WELDING & CUTTING  
FACILITY

DECISION

STATE PROJECT H59-9741-PG  
METRO CONTRACTING, INC.

POSTING DATE: MAY 8, 2001

vs.

FLORENCE-DARLINGTON TECHNICAL  
COLLEGE

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Metro Contracting, Inc. (Metro) under the provisions of § 11-35-4230 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on the Advanced Welding & Cutting Facility Project (Project) for Florence-Darlington Technical College (FDTC). Pursuant to § 11-35-4230(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and determined that mediation was not appropriate. A hearing was held on April 23, 2001. At the conclusion of the hearing, the record was held open to permit the CPOC to review the evidence in more detail. The hearing record was closed on May 4, 2001.

#### **NATURE OF THE CONTROVERSY**

Metro and FDTC entered into a contract for the construction of the Project, which generally called for the conversion of an existing building into a facility for the training of FDTC students in welding and other metal-working skills. The Contract Documents for the Project were prepared by the project's architect/engineer, Hayes, Seay, Mattern & Mattern (HSMM). The contract called for Metro to achieve Substantial Completion of the Project not later than 91 days after the formal Date of Commencement, subject to adjustments as provided in the Contract Documents. HSMM determined that Metro failed to achieve Substantial Completion as required by the Contract and FDTC subsequently assessed 45 days of liquidated damages at the per diem rate of \$200, for a total \$9,000. Metro contends that FDTC improperly refused to grant time extensions requested by Metro. These requests, if granted, would deny FDTC the right to withhold liquidated damages.

## **FINDINGS OF FACT**

1. On March 15, 1999 FDTC was authorized by the State Engineer to enter into a contract with Metro for the construction of the Project.
2. The initial Contract Time allowed was 91 days from the Date of Commencement, which was also March 15, 1999.
3. The initial date for Substantial Completion was June 15, 1999 as established in the Project's SE-390. This date was adjusted by Change Order 2 to August 17, 1999.
4. On August 17, 1999 Metro submitted a declaration that it was substantially complete with two exceptions and requested HSMM to inspect the Project.
5. On August 19, 1999 HSMM inspected the Project and identified four items requiring completion before the Project would be formally inspected for Substantial Completion. The items listed by HSMM were:
  - A. A suspended ceiling in one room was not installed.
  - B. A fence was not installed.
  - C. The welding booths required cleaning.
  - D. Utilities to a major equipment unit were not installed.
6. On August 30, 1999 the Project was inspected by HSMM and others to determine the state of completion and a list of discrepancies was prepared and issued by HSMM on August 31, 1999.
7. HSMM issued a Certificate of Substantial Completion that declared the project to be substantially complete on September 27, 1999.

## **DISCUSSION**

### **CLAIMANT'S POSITION**

Metro contends that its ability to achieve Substantial Completion was inhibited by two significant defects in the construction documents. The first defect was a door hardware schedule that failed to call for the door closers required by the building codes. This defect was not identified until the

August 30, 1999 inspection. The second defect was related to the size of wiring required for the welding machines. The resolution of this issue did not occur until September 28, 1999, when FDTC informed Metro that FDTC had elected to have the work performed by others.

### **RESPONDENT'S POSITION**

FDTC contends that the Project required the welding units to be functional in order to be substantially complete and that this condition was not achieved until September 27, 1999.

### **CPOC FINDINGS**

There are two intertwined issues before the CPOC.

The first is whether HSMM and FDTC correctly evaluated Metro's requests for additional time to accomplish the work required. The second is whether HSMM and FDTC correctly established the date of Substantial Completion for the Project. To the extent HSMM and FDTC acted correctly or incorrectly, liquidated damages should have been assessed or not assessed.

As to the first issue, according to testimony, the Contract Documents included a cash allowance for door hardware, with a list or schedule to be provided later by HSMM. This was done, and it is undisputed that Metro purchased and installed the hardware asked for. It is undisputed that the hardware schedule provided by HSMM did not include some items required by the building code, specifically three door closers. It is undisputed that this error by HSMM was not identified until the State Engineer's representative participated in the Substantial Completion inspection on August 30, 1999. It is undisputed that Metro proceeded, in advance of an approved change order, to procure and install the required hardware. It is undisputed that Metro completed this work on September 6, 1999. The eventual change order approved by FDTC did not allow Metro any additional time for this work. During testimony FDTC stated that additional time was not allowed for this work as a consequence of FDTC's opinion that Metro had shown a lack of progress during the project.

FDTC's decision on this issue is inappropriate and unsupportable. A builder's scope of work is defined by the contract documents. Moreover, a builder is entitled to rely on the plans and specifications provided by the Agency. The Agency, not the contractor, is responsible when those plans and specifications do not meet the Agency's needs. In this case, Metro cannot be held

responsible for not installing door closers when they were not required by the plans and specifications. FDTC, as the owner, must bear the consequences of this error. The CPOC finds that Metro should have been granted sufficient contract time to procure and install the additional door hardware, and on this issue, the adjusted required Date of Substantial Completion is September 6, 1999.

As to the second issue, according to testimony, the issue of errors in the design of the wiring for the welding machines appear to have surfaced in mid-1999. The general nature of the error, as presented to the CPOC, was a discrepancy between manufacturer's wiring requirements and the requirements of the building codes, specifically the National Electrical Code. It is uncontested that HSMM and FDTC, not Metro, were responsible for preparing the facility's electrical design, including compliance with both the manufacturer's requirements and the requirements of the electrical code. Metro identified discrepancies between these requirements and requested direction. While the subject of some discussion amongst the parties, it appears to the CPOC that Metro was not asked for a final proposal to change the wiring and switches until August 24, 1999. Metro's response was provided three days later, on August 27, 1999, including a request for a 10-day time extension. On September 28, 1999 HSMM advised Metro that this work would be performed by others, which it ultimately was.

The decision to grant or withhold a Certificate of Substantial Completion is made by the Architect/Engineer of record, in this case, HSMM. The definition of "Substantial Completion" contained in the Contract Documents (AIA A201-1987, *General Conditions of the Contract for Construction*) is:

*9.8.1 Substantial Completion is the stage in the progress of the Work with the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use.*

It would appear axiomatic that a facility intended to train welders could not be "substantially complete" until the welding equipment was installed and functional. That was certainly the intent of the contract as originally awarded and is the position maintained by HSMM and FDTC. However, the definition of "substantial completion" must be strictly applied to the specific elements of work for which a contractor is responsible. An Agency has unfettered discretion to divide the total scope of a project amongst a variety of performers. In this case, Metro was

originally tasked with providing the welding units' power supply wiring and connections. Metro offered to perform the work required to resolve the technical discrepancies and FDTC rejected the offer, effectively removing this work from Metro's contractual scope of work. According to the uncontested evidence, HSMM nevertheless refused to grant Metro a certificate of substantial completion until the welder connection work was completed by others.

The position argued by FDTC is without logic and is patently unfair. Once FDTC decided to remove the welder connection work from Metro's scope, the completion of that work became irrelevant to the question of a declaration of substantial completion of the work for which Metro was responsible. All evidence before the CPOC indicates Metro's adjusted contractual scope of work was complete when the door closers discussed above were installed and accepted by FDTC. The CPOC finds that the Certificate of Substantial Completion issued by HSMM improperly holds Metro responsible to complete work that is not within Metro's scope or control. The CPOC further finds that, based on the weight of the evidence presented, the actual Date of Substantial Completion for Metro's work shall be set as September 6, 1999. The actual date being the same as the adjusted required date, the CPOC accordingly finds that FDTC has no contractual right to withhold liquidated damages from Metro.

### **DECISION**

It is the decision of the Chief Procurement Officer for Construction that Florence-Darlington Technical College shall pay Metro Contracting, Inc. the sum of Nine Thousand Dollars (\$9,000). Payment of this sum is subject to the requirements of Section 11-35-45 of the South Carolina Code of Laws.



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Michael M. Thomas  
Chief Procurement Officer  
for Construction

May 8, 2001  
Date

### **STATEMENT OF THE RIGHT TO APPEAL**

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the Panel or to the Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.